IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

No. 72-1148

HOYT C. CUPP, Superintendent,
Oregon State Penitentiary,
Petitioner,

v.

HUGH KYLE NAUGHTEN,
Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENT

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OPINIONS BELOW

Respondent accepts petitioner's statement of opinions below.

JURISDICTION

Respondent accepts petitioner's statement of jurisdiction, correcting the date of the Circuit Court judgment to read May 24, 1972.

QUESTION PRESENTED

In a State criminal trial in which all the witnesses testified on behalf of the State, does a jury instruction that all witnesses are presumed to tell the truth (timely objected to) shift the State's burden of proving guilt beyond a reasonable doubt, place undue pressure upon the accused to testify, and deny the accused a trial by jury, as prohibited by the fifth, sixth, and fourteenth amendments?

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment V:

> "No person * * * shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law * * *."

United States Constitution, Amendment VI:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law * * *."

United States Constitution, Amendment XIV, Section 1:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

Respondent accepts petitioner's statement of the case, but also draws the Court's attention to that portion of the conference out of the presence of the jury which appears at A. 18-20; Tr. 140-142.

SUMMARY OF ARGUMENT

An instruction which expressly directs the jury to find that all witnesses speak the truth has as its purpose and effect the allocation of the burden of proof. To that extent it is similar to a presumption, rather than an inference. When all witnesses testify on behalf of the State, the instruction places the burden wholely upon the defendant. Unless the defendant carries the dual burden of going forward and of persuasion, the jury is obligated by law to find for the State.

The "presumption that witnesses speak the truth" is an historically sound device for appellate courts to test the sufficiency of evidence and to determine whether an issue should go to the jury. But when the jury is told they must apply the "presumption," the effect is to require conviction whenever the evidence is merely sufficient. This is equivalent to a directed verdict for the State.

Treated as a true presumption, the truthfulness presumption lacks a close connection between the proved fact and the presumed fact. Both law and social science recognize that in a very high percentage of cases witnesses should not be believed.

ARGUMENT

I.

A DIRECTION THAT STATE'S WITNESSES MUST BE BELIEVED REDUCES THE STATE'S BURDEN OF PROVING GUILT BEYOND A REASONABLE DOUBT.

The State must prove guilt beyond a reasonable doubt. *In Re Winship*, 397 U.S. 358 (1970). The trial judge's duty under *Winship* is not discharged merely by giving a reasonable doubt instruction. The most obvious way of shifting the State's burden of proof is to give the jury an instruction regarding witness credibility which artificially prevents the jury from independently assessing the credibility of witnesses. *Cool v. United States*, 409 U.S. 100 (1972).

The truthfulness instruction directly contradicted the burden of proof instruction. In a series of related paragraphs the trial court instructed the jury on (1) the meaning of a presumption and its status as evidence, (2) the presumption of innocence, (3) the presumption of truthfulness, and (4) the reasonable doubt burden of proof. A. 15-16; Tr. 137-138. This series emphasized that the jury was expressly directed—not merely permitted—to find that the witnesses were truthful. The instructions also placed the truthfulness presumption on the same plane as the presumption of innocence. Although the jury was told (as in *Cool*) that the burden of proof was upon the State, they were also told that the law "expressly directs" them to believe the State's witnesses.

The instruction specified three ways in which the presumption could be overcome: (1) the manner or nature of the testimony, (2) *evidence* affecting character, interest, motives, or *evidence* contradicting the testimony, or (3) a presumption. *First*, the vague "manner"

or "nature" of the testimony does not require the defendant to go forward with the evidence, but it does place the burden of persuasion upon him. Also, overcoming the presumption by "manner" or "nature" of testimony is difficult because the presumption is evidence, and the jury was repeatedly told to consider only the evidence. *Second,* production of evidence to impeach or contradict places upon the defendant the dual burdens of going forward and persuasion. Whether the evidence would be provided by Naughten or by his witness, the burden was on him. After all, this is the whole reason for having presumptions. McCormick, Evidence §343 (2d ed. 1972). *Third,* overcoming the presumption "by a presumption" creates a direct collision between the presumption of truthfulness and the only other presumption in the case—innocence. The jury may not know which presumption is stronger, but an attentive juror would notice that the presumption of truthfulness is given greater strength than the presumption of innocence. This is because the truthfulness presumption requires the jury to convict unless it is *overcome* by the presumption of innocence.

No matter how many ways the presumption could be overcome, it still places the burden on Naughten, and the jury had to have more than a reasonable doubt as to the credibility of the State's witnesses in order to acquit.

It should be noted that the truthfulness instruction was not merely a comment on the evidence. The trial judge was not expressing his opinion on the evidence; he instructed the jury that a presumption has the force of law, which the jury was obliged to obey.

II.

THE BURDEN OF PROOF AS TO WITNESS CREDIBILITY CANNOT BE PLACED UPON THE DEFENDANT.

Cool v. United States, 409 U.S. 100 (1972), prevents the State from placing upon the defendant the burden of persuading the jury that his witnesses are credible. Likewise, the State may not place upon the defendant the burden of persuading the jury that the State's witnesses are not credible. When the defendant pleads not guilty, he places in issue all facts which go to proving his guilt. The State has both the burden of going forward with evidence and the burden of persuading the jury.

Some burdens can be placed upon a defendant. If the State has carried its burden of going forward and of persuasion, then the burden of proving excuse or justification can be placed upon the defendant. *Leland v. Oregon*, 343 U.S. 790 (1952) (insanity defense). However, the burden of disproving the elements of the crime cannot be placed upon the defendant. *E.g., Stump v. Bennett*, 398 F.2d 111 (8th Cir. 1968) (alibi); *Johnson v. Bennett*, 393 U.S. 253 (1968). This approach is supported by the commentators. Christie & Pye, *Presumptions and Assumptions in the Criminal Law: Another View*, 1970 Duke L.J. 919; Ashford & Risinger, *Presumptions, Assumptions, and Due Process in Criminal Cases: A Theoretical Overview*, 79 Yale L.J. 165 (1969).

After a conviction is had, a reviewing court properly may assume that the State's witnesses told the truth. This is merely an appellate court's device for testing the sufficiency of the evidence. But instructing the jury that witnesses are presumed to speak the truth is the same as instructing them that they must convict if the evidence is sufficient. Such a blending of the sufficiency of evidence test with the reasonable doubt test would make the reasonable doubt test quite meaningless.

III.

TREATED AS A PRESUMPTION, THE TRUTHFULNESS INSTRUCTION LACKS A CLOSE CONNECTION BETWEEN THE PROVED FACT AND THE PRESUMED FACT.

The truthfulness "presumption" is technically neither a presumption nor an inference. This is because there is no proved fact from which the jury must presume (or may infer) some other fact. However, it may be that the swearing of the witness should be considered the proved fact. Nevertheless, an examination of the law of presumptions and inferences sheds light on the subject.

A. An inference instruction must be supported by a close connection.

Turner v. United States, 396 U.S. 398 (1970), dealt with a permissible inference as opposed to a mandatory presumption. The statute, 26 U.S.C. §4704(a), stating that absence of tax stamps is "prima facie" evidence of distributing drugs not in the original stamped package, was read to the jury. 396 U.S. at 402, 420. The Court's analysis of this "prima facie" rule as a permissible inference, 396 U.S. 419-424, was correct. "Presumption" cases antedating *Turner* all involved permissible inferences rather than mandatory presumptions. *Leary v. United States*, 395 U.S. 6 (1969); *United States v. Romano*, 382 U.S. 136 (1965); *United States v. Gainey*, 380 U.S. 63 (1965); *United States v. Tot*, 319 U.S. 463 (1943). These cases hold that at least a "more likely than not" connection is required when the jury is instructed as to an inference.

B. A presumption instruction must be supported by a very close connection.

Although *Leary v. United States*, 395 U.S. 6, 36 n.64 (1969), left open the issue of whether the inferred fact must flow beyond a reasonable doubt (rather than more likely than not) from the proved fact, the reasoning in *Turner* is based upon a reasonable doubt theory. The Section 4704(a) inference regarding cocaine was found faulty because there was a "reasonable probability" that Turner had obtained the cocaine in the original stamped package. 396 U.S. at 423-424. And the Section 4704(a) inference regarding heroin was allowed because there was "no reasonable doubt" that Turner had not obtained it in the original stamped package. 396 U.S. at 421.

Assuming arguendo that *Turner* establishes merely a more likely than not standard for the connection between the proved fact and the inferred fact, a closer connection is required when dealing with a mandatory presumption. The difference between a permissible inference and a mandatory presumption is substantial. An inference instruction tells the jury that it is permitted but not required to reach a particular conclusion. *Turner v. United States*, 396 U.S. 398, 406 n.6 (1970); *United States v. Gainey*, 380 U.S. 63, 70 (1969); McCormick, Evidence §342 at 803-804, §346 at 831 (2d ed. 1972). But a presumption instruction tells the jury that it must reach a particular conclusion. The Naughten jury was told that unless "out-weighed or equaled," "A presumption is a deduction which the law expressly directs to be made from particular facts and is to be considered by you along with the other evidence." A. 15-16. Thus, unlike the inference instruction relating to the use of a pistol, A. 15, the jury was *expressly directed* to find that every witness spoke the truth.

If a "more likely than not" connection is required when the jury has discretion to find or not to find an inferred fact, then a "beyond a reasonable doubt" connection must be required when the jury is expressly directed to find a presumed fact.

C. The truthfulness presumption applies to every element of the crime.

The presumption of truthfulness does not point the jury toward finding that any specifically articulated element of the crime was committed. Rather, it points the jury toward finding that each and every element of the crime was committed. For example, a key issue in Naughten's case was the identity of the robber. Both eyewitnesses testified that Naughten was the robber. The jury was expressly directed to believe these witnesses, and so was directed to find that Naughten was the right man. Another example relates to the element of being armed with a dangerous weapon. The two eyewitnesses testified that a pistol was used, although no pistol was ever recovered. The jury was required to believe that a pistol was used, and was further permitted to infer that the pistol was loaded and dangerous. This violates the rule against pyramiding an inference upon a presumption, thus shifting the burden of proof. *Malloy v. United States*, 246 A.2d 781 (D.C. App. 1968); Annot., 5 A.L.R.3d 100 (1966).

D. The law recognizes the tendency of witnesses not to speak the truth.

A century ago, some persons were considered so unlikely to speak the truth they were not permitted to testify at all. 1 Greenleaf, Law of Evidence §327 (13th

ed. 1876) asserts that some persons are incompetent witnesses because it is more likely than not that they will mislead the jury. Very few categories of incompetent witnesses exist under modern law, and most of the old reasons for excluding witnesses have become grounds for impeachment. McCormick, Evidence §61 (2d ed. 1972). The grounds for impeachment are many, and they are expanding. McCormick, Evidence §§33-50 (2d ed. 1972); Fed. R. Evid. 601 ff. (1973). Thus, the law recognizes the vast variety of human frailties which result in inaccurate testimony. Even unimpeached witnesses need not be believed by the trier of fact. *Quock Ting v. United States*, 140 U.S. 417 (1891).

E. Social scientists have demonstrated the tendency of witnesses not to speak the truth.

Studies by social scientists demonstrate the irrationality of presuming that witnesses speak the truth. Marshall, Law & Psychology in Conflict ch. 2 (1966) reports on an experiment in which 291 subjects were shown a 42 second movie. Most subjects thought the movie was more than 90 seconds long (p. 53). One week after the movie was shown, the subjects were asked whether the principal actor wore a light jacket, a dark jacket, or wore no jacket. More than 50 percent of the answers were wrong (p. 56). Similar studies, which demonstrate that eyewitnesses are quite unreliable, are collected and summarized in Gardner, *The Perception and Memory of Witnesses*, 18 Cornell L.Q. 391, 407-409 (1933). Some of the reasons for witness error are discussed in Moore, *Elements of Error in Testimony*, 28 Ore. L. Rev. 293 (1949).

IV.

THE TRUTHFULNESS INSTRUCTION HAS BEEN REJECTED BY MOST AMERICAN STATES WHICH HAVE CONSIDERED THE ISSUE.

Four state courts have specifically ruled that giving a truthfulness instruction in a criminal case is error. In *State v. Taylor*, 57 S.C. 483, 35 S.E. 729 (1900), a rape conviction was reversed because the jury was given a truthfulness instruction. In a well reasoned opinion the court noted that a truthfulness presumption would interfere with the presumption of innocence (that is, reduce the State's burden of proof). *Taylor* was criticized in *State v. George*, 113 S.C. 154, 102 S.E. 284 (1920), but the holding in *George* was simply that it was error to instruct that "There is no presumption that a witness tells the truth." *Hauser v. People*, 210 Ill. 253, 71 N.E. 416 (1904) (burglary convictions affirmed), and *Harris v. State*, 22 Ala. App. 121, 113 So. 318 (1927) (robbery conviction reversed), held that it was proper to refuse to give defendants' proposed jury instruction that unimpeached witnesses are presumed to testify truly; the courts stated that no such presumption existed. In *State v. Jones*, 77 N.C. 520 (1877), the court reversed an assault and battery conviction partly because it was improper to instruct the jury that "it is a rule of law, a presumption that men testify truly and not falsely." 77 N.C. at 521. See also *Sawyers v. State*, 15 Lea 694 (Tenn. 1885).

Other courts have held such instructions improper in civil cases and would probably hold the same in criminal cases. In *State v. Halvorson*, 103 Minn. 265, 114 N.W. 957 (1908) (bastardy action), the court disapproved of an instruction that "It is to be taken for granted that a

witness speaks the truth on the stand . . . ." In reversing a verdict for the State, the court reasoned: "This placed the burden upon the defendant to compel the minds of the jurors to the conclusion that the statement of the complaining witness was false . . . ." 114 N.W. at 958. Closely related instructions caused reversals in *Bradley v. Gorham*, 77 Conn. 211, 58 A. 698 (1904) (action for broker's commission); *Elder Dempster & Co. v. Menge*, 160 Fed. 341 (5th Cir. 1908) (personal injury); *Mullaney v. C.H. Goss Co.*, 97 Vt. 82, 122 A. 430 (1923) (contract).

In four states (plus Oregon) use of a truthfulness instruction in a criminal case has not resulted in reversal.

Calif. Code Civ. Pro. §1847 (West, 1955), repealed by Calif. Stats. 1965 ch. 299 effective 1967, provided:

> "A witness is presumed to speak the truth. This presumption, however, may be repelled by the manner in which he testifies, by the character of his testimony, or by evidence affecting his character for truth, honesty, or integrity, or his motives, or by contradictory evidence; and the jury are the exclusive judges of his credibility."

In *People v. Hardy*, 271 Cal. App. 2d 322, 76 Cal. Rptr. 557 (1969) (burglary conviction affirmed), a portion of the jury instruction included the statement, "All witnesses are presumed to tell the truth." The court noted that the instructions clearly explained that the jury was the sole judge of credibility, and noted that the instructions itemized the factors affecting credibility listed in Calif. Evidence Code §780 (West, 1966). Because the instruction applied equally to a defense witness, the court determined that it was not "probable that the jury received the impression that they were required to accept the testimony of the prosecution

witnesses." 76 Cal. Rptr. at 563. Apparently no claim was made that the instruction interfered with federal constitutional rights, and the court used a "harmless error" doctrine which would not comply with *Chapman v. California*, 386 U.S. 18 (1967); *Harrington v. California*, 395 U.S. 250 (1969).

Other California cases indicate that Calif. Code Civ. Pro. §1847 (West, 1955) was used mainly to emphasize that credibility is an issue to be left solely to the jury. 54 Cal. Jur. 2d *Witnesses* §§198-202 at 649-665 (1960) and cases cited; Calif. Evidence Code §780 annotations (West, 1966).

California has clearly rejected the notion that a witness is "presumed" to speak the truth. Comment, Assembly Committee on Judiciary, following Calif. Evidence Code §600 (West, 1966); Comment, Law Revision Commission, Calif. Code Civ. Pro. §1847, 1973 Pocket Part at 9.

Rev. Code Mont. §93-401-4 (1964) is identical to Calif. Code Civ. Pro. §1847 (West, 1955). An instruction modeled after the statute was given in *State v. Dotson*, 26 Mont. 305, 67 P. 938 (1902), but it was not objected to and did not become an issue.

In *State v. Wehde*, 236 Iowa 47, 283 N.W. 104 (1938), defendant's objection to a truthfulness instruction was that it left the jury free to judge the credibility of a State's witness who had been convicted of a felony. By affirming, the court merely refused to keep the witness' testimony from the jury.

In *Cornwall v. State*, 91 Ga. 277, 18 S.E. 154 (1893), the approved truthfulness instruction dealt with the issue of whether witnesses were committing perjury. Also see *Hamilton v. State*, 143 Ga. 265, 84 S.E. 583 (1915) (affirmed without opinion). In *Eidson v. State*, 66 Ga. App. 765, 19 S.E.2d 373 (1942), the court followed

Cornwall. A dissent, 19 S.E.2d at 375-376, argued that the instruction infringed upon the presumption of innocence (that is, reduced the State's burden of proof).

V.

THE TRUTHFULNESS INSTRUCTION HAS BEEN REJECTED BY ALL UNITED STATES COURTS OF APPEALS WHICH HAVE CONSIDERED THE ISSUE.

Of the United States Circuit Courts which have considered the issue, eight have held that the truthfulness instruction has as its effect a shifting of the burden of proof. *United States v. Birmingham*, 447 F.2d 1313 (10th Cir. 1971); *United States v. Stroble*, 431 F.2d 1273 (6th Cir. 1970); *United States v. Safley*, 408 F.2d 603 (4th Cir. 1969), cert. denied 395 U.S. 983 (conviction affirmed because no objection at trial); *United States v. Evans*, 398 F.2d 159 (3d Cir. 1968); *United States v. Dichiarinte*, 385 F.2d 333 (7th Cir. 1967); *Stone v. United States*, 379 F.2d 146 (D.C. Cir. 1967) (conviction affirmed because no objection at trial); *United States v. Johnson*, 371 F.2d 800 (3d Cir. 1967); *United States v. Persico*, 349 F.2d 6 (2d Cir. 1965). Other Courts of Appeals have condemned the instruction on other grounds. *United States v. Gray*, 464 F.2d 632 (8th Cir. 1972); *McMillen v. United States*, 386 F.2d 29 (1st Cir. 1967).

Some Circuit Courts take the position that if the defendant testifies or presents witnesses, then the burden created by the instruction balances off against both parties. *E.g., Smith v. Cupp*, 457 F.2d 1098 (9th Cir. 1972), cert. denied 409 U.S. 880 (1972); *United States v. Boone*, 401 F.2d 659 (3d Cir. 1968), cert. denied sub nom. *Jackson v. United States*, 394 U.S. 933 (1969); *Harrison v. United States*, 387 F.2d 614 (5th Cir. 1968).

But see *McMillen v. United States*, 386 F.2d 29 (1st Cir. 1967). Because Naughten neither testified nor presented witnesses, the effect of the instruction was to aid solely the State.

Some Circuit Courts have refused to reverse convictions when the truthfulness instruction includes a lengthy list of ways the presumption can be overcome. *E.g., United States v. Gray*, 464 F.2d 632 (8th Cir. 1972); *United States v. Boone, supra; United States v. Schwartz*, 398 F.2d 464 (7th Cir. 1968); *United States v. Bilotti*, 380 F.2d 649 (2d Cir. 1967), cert. denied 389 U.S. 944. The instruction given in Naughten's case did not come close to containing the extensive explanations contained in the instructions given in the above cases. In any event, the above cases are wrong. The presumption shifts the burden; no matter how many ways it can be overcome, the burden is upon the defendant.

VI.

THE TRUTHFULNESS INSTRUCTION HAS NOT BEEN A TRADITIONAL PART OF AMERICAN LAW.

The origin of statements that a witness is presumed to speak the truth is cloudy. The presumption is mentioned in 1 Starkie, Law of Evidence 545, 553-556 (7th Amer. ed, from 3d London ed. 1842). Starkie's comments on page 545 make the point that if a witness is not altogether excluded because of incompetence, he will be presumed to speak the truth. All the author meant was that persons who are not incompetent will be permitted to testify. On pages 553-556 Starkie simply says that the jury may be permitted to convict upon the unimpeached testimony of a single witness. Nowhere does the author propose a rule that a jury should be instructed that there

is a presumption of truthfulness. To the contrary, the point is made that credibility is solely a jury question. 1 Starkie, Law of Evidence 539.

1 Jones, Law of Evidence in Civil Cases §12 at 27, and n.9 at 28 (1st ed. 1896) states that "witnesses are presumed to have testified truthfully." The two cases given as authority do not support the point. In *Hewlett v. Hewlett*, 4 Edw. Ch. 7 (N.Y. Ch. Ct. 1839), the chancellor stated that it should not be presumed that in a prior insolvency proceeding the insolvent committed perjury by filing a false account. In *Matthews v. Lanier*, 33 Ark. 91 (1878), an action for rent, the court affirmed a denial of defendant's motion for a new trial. In doing so, the court said that the plaintiff's uncontradicted testimony was presumed true. The two cases stand for two common rules in civil cases: In *Hewlett*, that prior judicial proceedings were regularly conducted; in *Matthews*, that on a motion for new trial the evidence is viewed in the light most beneficial to the prevailing party.

Many decisions contain language that a presumption of truthfulness exists. But such language usually is used to explain other jury instructions, or to explain that an issue on credibility should be decided by the jury rather than by the court. *E.g.*, *State v. Voelpel*, 208 Iowa 1049, 226 N.W. 770 (1929); *Hauss v. Lake Erie & W. R. Co.*, 105 Fed. 733 (6th Cir. 1901); *Crane v. State*, 111 Ala. 45, 20 So. 590 (1896); *Jackson v. State*, 33 Tex. Cr. 281, 26 S.W. 194 (1894); *Johnson v. People ex rel. Peel*, 140 Ill. 350, 29 N.E. 895 (1892); *Comstock v. Rayford*, 12 Smedes & M. 369 (Miss. 1849). Contra, *Engman v. Estate of Immel*, 59 Wis. 249, 18 N.W. 182 (1884) (instruction approved).

Ore. Rev. Stat. §44.370, upon which Naughten's truthfulness instruction was based, derives from a Code

of Civil Procedure adopted October 11, 1862. Deady, Organic & Other General Laws of Oregon, 1845-1864 §673 (1866). The statute has remained practically unchanged since 1862. A statutory revision commission established by the 1949 Oregon Legislature made an unimportant change in the section.

Deady, Organic & Other General Laws of Oregon 1845-1864 at 315 n.1 (1866) indicates that the series of statutes which includes the original predecessor to Ore. Rev. Stat. §44.370 were "condensed and extracted from Greenleaf's Treatise on the Law of Evidence." However, counsel has found no reference to the truthfulness presumption in Greenleaf's Treatise.

The frequent use of the truthfulness instruction in federal courts during the 1960's may be attributed to Mathes, *Jury Instructions and Forms for Federal Criminal Cases*, 27 F.R.D. 39 (1961). See Inst. No. 2.04 at 51; Instr. No. 3.01 at 67-68. After the instruction was criticized in *Knapp v. United States*, 316 F.2d 794 (5th Cir. 1963), and concurring opinion at 795, Judge Mathes modified the instruction by changing the word "presumed" to read "assumed." Mathes & Devitt, Federal Jury Practice & Instructions §9.01 at 111-112, §72.01 at 396-397 (1st ed. 1965). In the face of mounting condemnation by the Circuit Courts, all references to presumptions and assumptions of truthfulness were omitted in the criminal instruction, but retained in the civil instruction. Mathes & Devitt, 1968 Pocket Part §9.01 at 90, §72.01 at 222. Truthfulness presumptions and assumptions were omitted in the 1970 revision. 1 Devitt & Blackmar, Federal Jury Practice & Instructions §12.01 at 252-254 (2d ed. 1970); 2 Devitt & Blackmar §72.01 at 144-146 (2d ed. 1970).

VII.

IN RE WINSHIP APPLIES RETROACTIVELY.

In Re Winship, 379 U.S. 358 (1970), decided after Naughten's case was tried, applies retroactively. The purpose of the *Winship* rule is to ensure that innocent persons are not convicted. It is inconceivable that any jurisdiction has acted in reliance upon a less stringent rule in criminal cases. Retroactive application will have a de minimus effect on administration of justice.

VIII.

THE TRUTHFULNESS INSTRUCTION DENIES THE RIGHT TO TRIAL BY JURY.

Closely related to the burden of proof standard is the issue who decides whether the burden has been met. By instructing on the truthfulness presumption, the judge rather than the jury decides whether the burden has been met. The effect is the same as a directed verdict for the State. *United States v. Birmingham*, 447 F.2d 1313 (10th Cir. 1971); *United States v. Stroble*, 431 F.2d 1273 (6th Cir. 1970); *United States v. Dichiarinte*, 385 F.2d 333 (7th Cir. 1967); *United States v. Johnson*, 371 F.2d 800 (3d Cir. 1967).

Of the several essential features of a jury trial, *Williams v. Florida*, 399 U.S. 78 (1970), one is that the jury be the sole judge of witness credibility without instructions dictating to them which result to reach.

IX.

THE TRUTHFULNESS INSTRUCTION INTERFERES WITH DEFENDANT'S RIGHT NOT TO BE A WITNESS AGAINST HIMSELF.

One of the ways of overcoming the presumption is "contradictory evidence." Under the facts of this case such evidence could be forthcoming only from Naughten himself. The pressure upon him to testify interferes with his absolute right not to testify at all.

X.

THE ERROR WAS PREJUDICIAL.

A. When the burden of proof is shifted, the error cannot be harmless.

Clearly some error cannot be harmless. *Gideon v. Wainwright*, 372 U.S. 335 (1963) (counsel at trial); *Payne v. Arkansas*, 356 U.S. 560 (1958) (coerced confession); *Tumey v. Ohio*, 273 U.S. 510 (1927) (impartial judge). For example, it would be illogical to assert that a double jeopardy violation could be harmless.

As in the case of a denial of counsel at trial, it is impossible for an appellate court to determine the likelihood of whether the jury would have convicted Naughten if the burden of proof had not been placed upon him. In neither *In Re Winship* nor *Cool v. United States* did any Justice assert that the error was harmless.

Unlike a case in which a small amount of illegal evidence was introduced in addition to a massive amount of lawful evidence, in Naughten's case the entire proceeding is tainted by a shift in the burden of proof. If the jury convicted by using a standard of less than reasonable doubt, there is no way to determine whether they would

have convicted had they applied the proper standard of proof.

B. The error was not harmless in this case.

The main factual issue in the State trial was the identity of the robber. The testimony of eyewitnesses Livengood and Weissenfluh filled about one-half the pages of testimony. (Tr. 9-22, 26-70). And a significant amount of the testimony of the two policemen and one detective was identification testimony. (Testimony regarding identity of the robber, his clothing, money taken, and an automobile allegedly used is contained on the following pages of the transcript: 13-15, 16-19, 27-32, 34-40, 43-46, 58-68, 73-77, 79-83, 89-95, 97-108, 110, 113, 118-122, 124-128, 130-131.) The instruction compelled the jury to believe all of the testimony of these witnesses. Petitioner's only real defense (assuming he does not testify) is to argue that the witnesses should not be believed. But the presumption of truthfulness, which is evidence, cannot be overcome by argument.

XI.

THIS CASE IS APPROPRIATE FOR HABEAS CORPUS RELIEF.

Because this case raises claims dealing with the burden of proof, jury trial, and self-incrimination, and involves the integrity of the fact finding process, it is an appropriate case for habeas corpus relief under 28 U.S.C. §§2241-2254. *Schneckloth v. Bustamonte*, ___ U.S. ___, ___ (1973) (concurring opinion of Powell, J.); *Kaufman v. United States*, 394 U.S. 217 (1969).

CONCLUSION

The judgment of the United States Court of Appeals for the Ninth Circuit should be affirmed.

Respectfully submitted,

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June 1973